EMPLOYMENT TRIBUNALS

Claimant: **Mr W Berry**

Respondent: **Alliance Healthcare Management Services Limited**

Heard at: **Leeds by CVP** **On: 12-16 December 2022**

Before: **Employment Judge Maidment**
Members: **Mr D Wilks OBE**
Mr DW Fields

Representation
Claimant: **Ms F Almazedi, Solicitor**
Respondents: **Ms G Holden, Counsel**

JUDGMENT having been sent to the parties on 29 December 2022 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant brings a complaint of ordinary unfair dismissal, where the respondent asserts that it terminated the claimant for a reason related to conduct, a potentially fair reason for dismissal. The respondent asserts that the claimant was effectively absent without leave.

2. Classically, in cases involving conduct, the tribunal is concerned to determine whether the respondent held a genuine belief in the misconduct on reasonable grounds and after reasonable investigation. Dismissal may be unfair if a fair procedure was not followed and the tribunal will have regard to the ACAS Code of Practice on Disciplinary Procedures. Ultimately, then the determination is whether

the decision to dismiss fell within a band of reasonable responses open to an employer in these circumstances.

3. The claimant maintains that the real reason for his dismissal was his having made a protected disclosure and therefore that it is also automatically unfair pursuant to Section 103A of the Employment Rights Act 1996.

4. In terms of protected disclosures, the claimant relies on a telephone call he made to Ann Jones on 6 February 2020 which the respondent accepts was a protected disclosure. Ms Almazedi confirmed that no reliance was placed on a previous claim the claimant brought to the employment tribunal

5. The claimant separately brings complaint of unlawful detriment on the grounds of his protected disclosures as follows:

    5.1. not supporting the claimant in attempting to return to work from 27 February 2020 until 16 April 2021
    5.2. deliberately ignoring the claimant's text of 14 May 2021 where he informed the respondent that he was unable to attend the disciplinary hearing owing to his mental ill-health
    5.3. deliberately sending the claimant standard letters that made no provision for his difficulties knowing he has literacy issues and anxiety and depression and that he is reliant on family members to explain correspondence to him
    5.4. failure to offer the claimant an opportunity to have a family member or support person attend meetings with him
    5.5. by Sue Hanson saying that the claimant had failed to provide an explanation for his absence at the disciplinary meeting when she was aware of the text he sent to the respondent on 14 May 2021
    5.6. dismissing the claimant without taking steps such as obtaining an occupational health report - dismissal on its own/in itself cannot amount to a detriment in the case of an employment relationship
    5.7. failing to explore what support the claimant needed to return to work

6. The claimant then brings complaints of disability discrimination. The respondent accepts that at all material times the claimant was a disabled person because of stress, anxiety and depression, which caused auditory hallucinations. The respondent, however, denies that it had the requisite knowledge of the claimant as a disabled person so as to be liable for the complaint pursued.

7. The claimant brings a complaint of discrimination arising from disability where the unfavourable treatment is said to be his dismissal which arose from his absence from work due to his disability from 27 February 2020. The respondent maintains that it acted proportionately as a means of achieving the legitimate aim of following its own internal policies relating to employees who are absent without leave.

8. The claimant also brings a complaint that the respondent failed to comply with its duty to make reasonable adjustments. This is reliant on the following PCPs:

   8.1. expecting the claimant resume his contractual duties on the first tribunal claim ending, without consideration of any meaningful support measures
   8.2. expecting the claimant to return to work alongside the same managers in the same role

9. The tribunal raised with Ms Almazedi that these did not appear to be general practices, but rather aspects of individual treatment of the claimant. Nevertheless, a general practice which might have been relied upon could be discerned from some of the reasonable adjustments sought. Ms Holden indicated that the respondent would oppose any application to amend the claimant's pleaded case, which it was maintained would require the respondent to call additional evidence. Ms Almazedi ultimately determined not to pursue any application to amend the PCPs relied upon in any event.

10. The adjustments the claimant says ought reasonably to have been made are as follows:

    10.1. asking the claimant for a point of contact (trusted support person) and also copying them into the letters that the respondent sent to the claimant
    10.2. offering to meet the claimant at a neutral location with respect to meetings and allowing the claimant the support of a family member or supporting person
    10.3. conveying the above in letters sent to the claimant which should have been adapted with respect to their content and format
    10.4. requesting the claimant's GP notes and an up-to-date occupational health report before taking steps to discipline and dismiss the claimant
    10.5. providing reassurance to the claimant that he would not suffer retaliation when he returned to work including looking at a change of management/role and a stress risk assessment and/or mediation
    10.6. adjusting the respondent's absence management policy in relation to the requirements of absence reporting, the requirement for attendance at meetings and discounting of time off with anxiety and depression
    10.7. pausing the final meeting at which it was decided to dismiss the claimant on receipt of the claimant's text message advising the respondent that he was too mentally unwell to attend
    10.8. adjusting the disciplinary and dismissal processes and delaying both to accommodate the fact that the claimant needed support to participate and respond to both processes
    10.9. taking steps to accommodate the claimant's disability based on the email of 6 May 2020 from John Rozenstein of the CAB specifically flagging up the difficulties that the claimant had with respect to absence reporting and the fact

that he required someone to accompany him to such meetings because of his mental health

11. The claimant brings a separate complaint of victimisation reliant upon his previous employment tribunal proceedings as a (conceded) protected act.

12. In terms of detriment the claimant then, as with the whistleblowing claim, relies on:

    12.1. not supporting the claimant in attempting to return to work from 27 February 2020 until 16 April 2021
    12.2. deliberately ignoring the claimant's text of 14 May 2021 where he informed the respondent that he was unable to attend the disciplinary hearing owing to his mental ill-health
    12.3. deliberately sending the claimant standard letters that made no provision for his difficulties knowing he has literacy issues and anxiety and depression and that he is reliant on family members to explain correspondence to him
    12.4. failure to offer the claimant an opportunity to have a family member or support person attend meetings with him
    12.5. by Sue Hanson saying that the claimant had failed to provide an explanation for his absence at the disciplinary meeting when she was aware of the text he sent to the respondent on 14 May 2021
    12.6. dismissing the claimant without taking steps such as obtaining an occupational health report
    12.7. failing to explore what support the claimant needed to return to work

13. Finally, the claimant brings a complaint seeking damages for breach of contract with reference to his notice period.

Evidence

14. The tribunal had before it an agreed bundle of documents numbering some 295 pages as well as witness statements exchanged between the parties. The tribunal spent some time privately reading into the witness statement evidence and relevant documentation so that when each witness came to give evidence, he/she could simply confirm his/her statement and then be open to be cross-examined on it, subject to any brief supplementary questions.

15. The tribunal heard firstly from the claimant, who was supported by his cousin and in circumstances where due allowance was made for any difficulties the claimant had in reading documentation and processing information. On behalf of the respondent, the tribunal then heard from Mr Dean Scott, formerly Outbound Delivery Manager and Sue Hanson, Loss Prevention Manager.

16. The tribunal was also provided with an opening note on behalf of the respondent and the claimant's written skeleton argument.

17. Having considered all relevant evidence, the tribunal makes the findings of fact set out below.

Facts

18. The respondent is a major distributor and wholesaler of pharmaceutical, medical and healthcare products. The claimant was employed, with continuity of employment from 10 September 2012, as a warehouse operative in the outbound department at the Leeds Service Centre, working from 11am – 3pm each weekday. This was part of the morning shift, comprising of around 30 operatives in that department. They then handed over to a back shift working the afternoon and evening. Between 150-200 employees in total were based in Leeds, one of over a dozen service centres around the country. There was a small admin and payroll function on site, but HR support was provided from a (remote) central service. Claire Woolley was the HR business partner for Leeds.

19. The respondent accepts that the claimant was a disabled person by May 2021 due to stress, anxiety and depression. He had, by then, been absent due to sickness since February 2020.

20. The claimant described himself as really struggling with everything at the time and it having been difficult, due to the pandemic, to organise the support that he needed to be able to deal with, for instance, correspondence. He felt desperately anxious and was struggling after having no routine for such a long time. He described himself as having become more vulnerable and having no self-confidence. The enthusiasm and energy that he had whilst at work was gone. He was spending his days mostly alone, struggling with taking his medication and feeling disconnected. He described himself as utterly detached from reality and not able to concentrate or attend to anything. Either his daughter or his cousin, Trevor, would open piles of post that he had just left. The claimant described himself as unable to read and write. Certainly, his level of literacy was very poor. With the state of his mental health, he was not bothering with anything and nothing was getting done.

21. The claimant's impact statement, upon which he was not materially challenged, described him as having suffered from stress, anxiety and depression for a number of years. When he felt really disconnected and when under stress, his depression and anxiety could take over and dominate his days.

22. Again, he relied a lot on his family, especially his daughter, who often had to oversee his affairs and make sure he took medication and kept on top of cooking and eating which otherwise might go unaddressed because he got so down that he couldn't be bothered. He tended to "switch off", causing him a lot of practical issues. He missed appointments and forgot important dates if not prompted. He had trouble sleeping and found it very difficult to concentrate on anything. He needed high levels of support When he became very anxious, he tended to hear

voices, especially of his deceased mother. He could talk to her for a long time when very upset, finding this to be reassuring. He needed others to be present if he was dealing with official situations and required things to be explained to him and for him to be given time to absorb what was being said. He got nervous in relation to meetings and making phone calls. He mulled over things. He struggled to get anything done and lost interest in everything. He let his appearance go and neglected his personal hygiene. He felt very negative. He was sometimes not able to cope with the smallest of things. He did not at times leave the house for days and just wanted to sleep. He had suicidal thoughts.

23. A medical report, produced on a joint instruction by the claimant and respondent described the claimant as panicky when around people, suffering low mood and feeling fed up and stressed. He was described as experiencing sweating, tiredness, weakness and difficulty concentrating. The expert concluded that there had been a worsening of functional restrictions from mild in 2019 to moderately severe at the date of assessment. He described the claimant having a worsening from 2021 in his psychological condition with the loss of motivation from the tribunal process (a first tribunal claim which was concluded after a full hearing in April 2021) and breakdown of his social framework.

24. The claimant had received a copy of the respondent's staff handbook (certainly in 2016) which included a section on sickness absence making it clear that the respondent expected a level of satisfactory attendance, noting that unplanned absences could cause it problems. The claimant was aware, in any event, of the need to notify managers if he was absent due to sickness and to ensure that extended absences were covered by appropriate fit notes. In the section dealing with disciplinary issues, it was set out that being absent without leave amounted to potential gross misconduct.

25. The claimant was absent from work from 13 June until 14 July 2019 with 3 successive fit notes covering the period and citing work-related stress as the reason for absence.

26. Occupational health conducted a telephone assessment with the claimant on 17 July 2019. This referred to him having returned to work on 15 July. The claimant described the circumstances which resulted in his absence as including a poor relationship with his manager, feeling unsupported and being treated unfairly. Concerns about the behaviour of some of his colleagues towards him had been reported, but not addressed. The claimant was said to have reported, "as you are aware", issues with literacy and relied on help from family to read documents and assist in completing forms. After meetings with management, he had been given transcripts, but no one was available to read them to him. The claimant was said to be fit to carry out his normal duties. Work factors were said to be the triggers to his stress-related symptoms. He would benefit if he felt supported in the workplace. He was fit to attend meetings, but it was said that those may involve

accompaniment by a friend or family member. The respondent was advised to give the claimant assistance to enable him to read any documents.

27. As found by a tribunal in earlier proceedings brought by the claimant, on 5 February 2020 a "near miss" report was prepared in respect of a ladder which had been left in an aisle in which the claimant had worked. On 6 February the claimant was criticised for not cleaning the aisle at the end of his shift. On that day the claimant made a telephone call to Ms Ann Jones, regional manager. He informed her that on the 2 previous days he had noticed that colleagues in the warehouse had not been wearing protective footwear and that a fire escape was blocked by 3 sets of ladders. Ms Jones asked the claimant if he had removed the ladders. He said, incorrectly, that he had. She said that she would take matters up with Ms Louise Rycroft, Service Centre Manager. On 7 February 2020 the claimant was asked to attend a meeting with Ms Cousins, then his line manager. Ms Rycroft and an HR manager joined the meeting. Ms Cousins attempted to discuss an issue regarding the claimant's wages which he had queried on 9 January and again in a letter from the CAB written on his behalf dated 31 January. The claimant became upset. He wished to have his chosen union representative present. He lacked an understanding of what the letter from the CAB said. Ms Rycroft wanted to discuss the health and safety issues the claimant had raised. The claimant became agitated and attempted to leave the room, but was told to sit down. When he became more agitated, he was allowed to leave. Ms Rycroft and Ms Cousins took the decision to suspend the claimant and initiate an investigation into insubordination, failure to comply with management instructions and to follow health and safety procedures. Following an investigatory interview, conducted by the loss prevention manager based in Leeds, Ms Hanson, all charges other than the breach of health and safety were dropped. That allegation proceeded to a disciplinary hearing on 26 February where, after a finding of gross misconduct, the claimant was given a final written warning.

28. The earlier employment tribunal found that Ms Rycroft was concerned that the claimant had escalated all the health and safety matters externally. The presence of 2 senior managers and a HR business partner would have unnerved the claimant and the arranging of the meeting in this way was a reaction to the irritation that the health and safety concerns had been raised with someone who Ms Rycroft would have to account to. Ms Cousins' justification for the claimant's suspension was not accepted and the allegation of insubordination was considered to be a disproportionate representation of how the claimant had behaved, which must have been known to both Ms Cousins and Ms Rycroft. It was noted that when the matter was investigated by Ms Hanson, she did not consider it had the necessary substance to proceed to a disciplinary hearing. The claimant was suspended and subjected to retaliatory action and accused of insubordination and rudeness to management because he had made the protected disclosure to Ann Jones.

29. As already referred to, the claimant had been subsequently invited to an investigation meeting attended by Ms Hanson and Scott Barton on 13 February 2020. There was no complaint in the first tribunal proceedings about the decision making of Ms Hanson.

30. The claimant was absent again due to work-related stress from 28 February 2020, again covered by successive fit notes. At this point the claimant was suspended from work pending the completion of the investigation.

31. There was phone contact with the claimant on 27 February 2020 by Ms Cousins. She completed a keeping in touch document which recorded that a fit note had been issued which covered the claimant for the period from 28 February – 27 March 2020, again due to work-related stress. It was noted by her that the claimant had made no contact with his line manager during the period of "this first sick note". It was noted that, when the claimant rang in initially, he was asked to call in daily until his sicknote was received.

32. Ms Cousins spoke to the claimant again on 27 March 2020 when the sicknote was due to expire. The claimant reported that he was getting another sicknote and would not be returning. It was asked that the claimant contact her on a fortnightly basis with an update on his health. It was noted that a letter had been sent to the claimant requesting that he contact Ms Cousins to organise a welfare meeting. In an email of 27 March, Ms Cousins thanked the claimant for his sicknote and asked for a call from him every 2 weeks. She said that she would need to meet with him as soon as possible to understand what his stress was and to try to resolve this to enable him to return to work. She asked that he call her on the Monday to discuss a meeting date. The claimant told the tribunal that he was frightened at this time and could not recall if he had responded.

33. On 10 April 2020, Ms Cousins wrote to the claimant asking him to contact her on a mobile telephone number she gave by 15 April to discuss his availability for a welfare meeting. She said that the meeting was an opportunity for her to answer any queries he might have and to discuss the likelihood of a return to work and anything more the respondent could do to support him. The letter was resent on 17 April.

34. The claimant commenced early conciliation through ACAS on 18 April and obtained an early conciliation certificate on 20 April, upon which date he submitted his first tribunal complaint. The respondent submitted its response to that complaint on 27 May 2020.

35. The claimant exhausted his entitlement to contractual sick pay on 24 April 2020 and statutory sick pay in September 2020.

36. Ms Cousins completed a further keeping in touch document on 27 April 2020 recording that no contact had been made since 27 March and that the claimant had failed to respond to any letter sent. She noted that she had called him on 29 April and left a voicemail and had called again on 30 April, but with no answer. A further letter was sent on 30 April asking him to contact the site to arrange a meeting to discuss his health and wellbeing. There was reference to this being the third request for a welfare meeting. Again, the claimant told the tribunal that he was scared at the time as he would be dealing with the same managers who had caused his initial problems.

37. It was put to the claimant in cross-examination that there was then a cessation of contact with him until April 2021 because he had asked that the respondent did not contact him until the outcome of his employment tribunal case. He said that that was incorrect. There is no evidence of the claimant having made that request. Ms Hanson said that she had enquired of Ms Woolley in May 2021 as to why there had been a lack of contact and was given to understand that it was agreed that there would be no contact from December 2020 until after the tribunal proceedings. She agreed that there was no document to that effect and said that she was not aware if this was at the request of the claimant or the decision of the respondent. The tribunal cannot conclude that there was any arrangement.

38. The claimant's GP record of 22 July 2020 stated that the claimant could still not focus on anything other than his tribunal case and that he had told his GP that, when it was over, he could restart his life and would do this by returning to work.

39. Whilst mis-addressed and never received by the respondent, a CAB adviser, who had assisted the claimant, attempted to email Ms Cousins on 6 May in 2020. Within this he stated that the claimant found it impossible to comply with a request to contact her on 5 May and to go to a welfare meeting on 6 May 2020. The claimant told the tribunal that he was scared of Ms Cousins and was in a bad way with his mental state.

40. A final fit note of 7 October certified the claimant as unfit to work until 6 December 2020. The claimant confirmed to the tribunal that he was aware that as one fit note was coming to an end, he had to return to his doctor to ask for a further one. The claimant said that he did not realise that a failure to provide fit notes thereafter amounted to a breach of the respondent's managing attendance policy. His position was that the respondent was aware of the reason for his continuing absence.

41. The claimant was not contacted then by anyone from the respondent until April 2021. The claimant disagreed, when put to him, that this was beneficial for him.

42. The claimant's employment tribunal claim was heard from 29 March until 8 April 2021. The claimant had brought claims alleging disability discrimination, race discrimination, victimisation and that he had been subject to detriments for having made a public interest disclosure. The tribunal did not find the claimant to have been disabled at the material time of his complaints. He succeeded in his whistleblowing complaint, but not in the other complaints and was awarded compensation for injury to feelings in the sum of £10,000 plus interest. Written reasons were requested and supplied to the parties on 12 May 2021.

43. Within this earlier claim, the claimant was relying on a learning difficulty, anxiety and depression as his disabling impairments. It was concluded that the evidence did not support disability status at the time to which the claims related. The claimant had, however, been prescribed promethazine for schizophrenia from 6 March 2020, after the period to which the complaints related. He had also succeeded in obtaining Personal Independence Payments on an appeal, which backdated the award to 27 April 2020. His PIP application placed reliance upon him experiencing hallucinating conversations. The claimant also, it was found, had been prescribed mirtazapine for anxiety and depression in August 2020. It was accepted that the claimant had literacy problems, but no learning difficulty which constituted a disability.

44. The claimant's GP notes, which were before the earlier tribunal, following disclosure to the respondent, included a reference to him being started on mirtazapine on 5 August 2020.

45. Mr Dean Scott commenced employment with the respondent at the beginning of March 2021 as outbound delivery manager and, as such, the claimant's new line manager. The claimant received no communication about Mr Scott's appointment. Mr Scott had 2 team leaders beneath him and reported to Joanne Cousins, by now promoted to production team leader, who in turn reported to Ms Rycroft, service centre manager. The senior management team was completed by George Walters, fleet and transport manager and Sue Hanson, loss prevention manager. Ms Hanson was at a grade below Ms Cousins, but reported to head office rather than to anyone at the Leeds service centre.

46. Mr Scott said that he was unaware that Ms Cousins and Ms Rycroft were the subject of employment tribunal claims until these current proceedings were brought. He said that he was only aware of those proceedings when he had been asked to be a witness in the current proceedings, which he thought was sometime around July 2022. On being pressed in cross-examination, he said that he had been previously told that there had been "some meetings and some other stuff". He could not recall who had passed him the issue of the claimant's absence as a matter to deal with. In his witness statement he said that he thought the claimant's absence was brought to his attention by either payroll and administration or by Ms Woolley. When put in cross-examination that Ms Cousins or Ms Rycroft were likely

to have given him this information, he responded: “not really, no… I can’t say for sure if it was or wasn’t.”

47. He said he would typically receive only an individual’s sickness file and not the separate personnel file. The sickness file included fit notes, but not necessarily much else. It does not appear that Mr Scott saw the earlier OH report or keeping in touch notes – he had no recollection of them.

48. His evidence was that it was his focus to get the claimant into a meeting and it would only be at such meeting that they would discuss health issues. Normally, he said, a person would tell him about them having a disability which prevented them from coming in. Mr Scott said that he did not ask anyone why the claimant had been absent, having noted that there was no sick note covering the period after 6 December 2020. He said that he wanted to speak to the claimant. He said that he did not know why he had not asked anyone for more information regarding the reason behind the claimant’s absence. He did not reject the proposition put to him in cross-examination, that it was implausible that he had not.

49. He said that he had not spoken to anyone within HR. There had been no handover from any predecessor and in fact he was unsure who his own predecessor had been. He was aware that Ms Cousins had held the position previously and Scott Barton for a short period, prior to him becoming a driver, but thought that there had been a period where there had been no one in position before his recruitment.

50. When put to him that it appeared unusual for an employer to tolerate no sick notes being provided for an extended period, he said that he did not know how long the department had operated without a manager. He said that it was possible that the claimant had left the respondent and was working elsewhere. Nothing he saw provoked any curiosity regarding the claimant potentially having an underlying disability – again, this is, he said, something he would normally find out when he got to sit down and talk to the employee.

51. He said that he had not thought about giving the claimant a call to introduce himself, saying that he assumed that the claimant would contact him if he did not want to see him. He confirmed that he was embarking on a process in accordance with the company’s procedures.

52. Again, he was unaware that there was any sort of understanding that there would be no contact with the claimant until his first tribunal proceedings had been concluded. He did not even know about those proceedings at the time. He was unaware of any such arrangement being documented anywhere.

53. It was put in cross-examination that Mr Scott first wrote to the claimant 8 days after the tribunal had delivered its judgment in the first case. He confirmed that Ms Cousins and Ms Rycroft would have been present when the judgment was delivered. When asked if there was any reason why the letter was sent when it was, he said that there wasn't and it was simply when the file was passed to him. It was probably passed to him on the day he wrote the letter. Again, he said that he "didn't recall" Ms Cousins or Ms Rycroft asking him to do anything. It could be coincidental he said that the tribunal had just concluded. He again said that the tribunal case had not been discussed. He had no idea how management felt about the case. He didn't know if he had been put in a position to deal with the claimant's case because he was impartial.

54. Mr Scott wrote to the claimant in a letter sent by recorded delivery dated 16 April 2021. This noted that the claimant had been absent since 27 February 2020 and that his last fit note expired on 6 December. He said that an updated fit note was now required from 7 December 2020. He said that he would also like to arrange a welfare meeting with the claimant to talk through his reason for absence, what the respondent could do to support him and any further options available.

55. The claimant was referred to the respondent's absence policy requiring him to keep his manager informed of his absence. Mr Scott asked that the claimant contact him on a mobile phone number given within the letter, upon receipt, to discuss his absence and when he would be able to attend a welfare meeting. Mr Scott then asked for a reply to the letter within 7 days of receipt.

56. The claimant confirmed to the tribunal that this letter was delivered and signed for on 17 April 2021. He said that his cousin went through it with him. When asked if the request for a fit note came as a surprise, he said that he could not remember and fit notes had not been easy to provide due to his state of mental health. He said that once a sick note had been provided, an employee was okay from then on and "they leave you alone". His cousin had explained the need to send a fit note. He agreed, however, that he hadn't done so, referring again to his mental health and that it had been his intention to send one, but it slipped his mind. He agreed in cross-examination that this was a supportive letter from Mr Scott.

57. The claimant's position before the tribunal remained that the respondent wanted to get him back into the workplace without providing any support. When put to him that they were trying to arrange a welfare meeting to consider that support, he said that he had told the respondent about his mental health and received so many letters from Mr Scott that he felt overloaded. He, therefore, sent him a text. He agreed, however, that he did not send a specific reply (by text or otherwise) to this letter.

58. Mr Scott sent a second letter to the claimant dated 29 April, again by recorded delivery. The claimant struggled to recollect receiving it, saying that he never signed for it. He just recalled signing for one letter and then getting a number of letters all together. He read this letter, but together with another one. A certificate of posting confirmed its delivery on 30 April.

59. In this next letter, Mr Scott referred to the previous letter of 16 April and a lack of response from the claimant. He reminded the claimant of the respondent's absence policy requiring him to keep his line manager and the respondent informed of his absence, stating that a failure to do so was a disciplinary offence and breach of his contract of employment, which might lead to disciplinary action and ultimately result in dismissal. Again, he gave a mobile telephone number for the claimant to contact him on. He advised the claimant that a temporary stop had been put on his pay. That was inaccurate (in that entitlement to any form of pay had already ceased) and appears to be an inclusion in error from a template letter. He asked for a reply within 7 days.

60. The claimant did not accept in cross-examination that he ignored the letter. He said, however, that sometimes, when things were read to him, he couldn't make sense of them and it went in one ear and out of the other.

61. Mr Scott next wrote to the claimant by letter of 7 May. The tribunal has seen proof of delivery stating the letter to have been signed for by "BERRY" on 12 May. The claimant had no recollection of signing for it, believing that all subsequent correspondence had just been put through the door like normal post. He said that his mental health was deteriorating at this time and he was finding it hard to take things in. He recalled nevertheless seeing this letter.

62. In it, Mr Scott required the claimant to attend an investigation meeting at the Leeds Service Centre where the claimant normally worked on 14 May 2021. Mr Scott stated that this was believed to be a reasonable request and a failure to follow the instruction was potentially an act of gross misconduct which might render the claimant liable to summary dismissal. The claimant was told that he could be accompanied by a work colleague or trade union representative of his choice. The claimant was asked to contact Mr Scott if he required any assistance in making the arrangements. He was told that if he did not attend the meeting, a decision would be taken in his absence.

63. Mr Scott told the tribunal that it had not occurred to him to try any other method of communication with the claimant. He said that he was unaware until these current proceedings that the claimant had any literacy issues. Again, he did not think to speak to anyone else to get more information about the claimant and told the tribunal that he was unaware how long the claimant had been with the business. Whilst he was aware of the claimant previously having been signed off due to

stress, he had not thought to consider whether that condition may have been affected adversely during the coronavirus pandemic. He recognised that during this period it would have been harder for anyone to get advice and indeed to see their GP. He accepted that there was an inconsistency in the claimant not having been actively chased for contact for a period and now being asked to respond to letters with some urgency. He recognised that a lack of contact with their employer could be detrimental to a person's health. He could understand why the claimant receiving this chain of correspondence after the tribunal proceedings and a lengthy period of absence might be anxious. He was not aware, however, of how the claimant was likely to have felt at this point.

64. On 13 May the claimant sent a text to one of the work mobile phones stored within his own phone, rather than with reference to the numbers provided by Mr Scott. In fact, this was sent to the number Mr Scott had given the claimant in the first letter of 16 April - the number of the phone used by the outbound team leader. In the subsequent letters Mr Scott had given his own work mobile number. The text read as follows: "To Dean Scott, regarding welfare meeting on the 14th May, I am unable to attend due to my mental state, there will be letter within 2 weeks from my doctor emailed to Joanne Cousins." The claimant agreed that he made no reference to when he might be able to attend a meeting, saying that he was letting Mr Scott know how his mental health was. He had used a voice recognition app on his phone to read out the words which were then transposed into the text. He told the tribunal that he thought that Mr Scott would maybe phone him.

65. Mr Scott thought that the text would have been picked up by the team leader, Michelle Moore. He did not, however, recall who had passed the text on to him or when. He said, for instance, that he couldn't recall whether he had the text before he subsequently invited the claimant to a disciplinary hearing. He thought he probably hadn't because in that letter he referred to there having been no contact and he would have regarded the text as 'contact' with him. Once he was aware of the text, he said he believed that he had passed it on to Sue Hanson. The text certainly did not cause him to revisit the appropriateness of an invitation to a disciplinary hearing. When put to him that any reasonable disciplinary process would have been paused on receipt of the text, he responded: "yes, I suppose so.". When put to him that the claimant was suggesting that he might provide something from his doctor within 2 weeks and that, therefore, why could the process not be paused until such other communication was received, he said that he didn't know and that he supposed he could have paused the process. He agreed now that the text showed that the claimant did want to engage and was not ignoring the process. He agreed it wasn't "a big ask" to pause the process.

66. When the claimant was asked about the reference to him obtaining a letter from his doctor, he said that with his mental state he believed that the respondent had received a fit note, the claimant recognising that, given his state of health, this "must have gone beyond me".

67. The claimant said in evidence that he considered that the respondent's management did not want him in the workplace and there was anger around him having succeeded in claims against his managers. He did not accept in cross-examination that he was jumping to conclusions, saying that this was based on the way he had been treated in the last year and, given his mental health, his head was all over the place.

68. Mr Scott carried out a form of investigation meeting on 14 May in the claimant's absence.

69. The tribunal notes that one of the claimant's GPs wrote a "to whom it may concern" letter on 19 May 2021 saying that the claimant had ongoing problems with his mental health caused by problems experienced at work. It recounted that he had told his GP that he had the support of a solicitor and regularly had support from the mental health service for his problems and had just started to turn a corner in his own mind. Without that support and his medication, the claimant believed he may have reached a place where he had decided it was better off not living. The doctor stated that: "the thought of returning to work after the difficulties experienced threatens to negatively impact his mental health and regress the progress he has made. Wilbert has done everything he can to get himself into a positive place. I would support Wilbert not returning to work because of the incidences that have occurred in order to prevent a relapse in his mental health." The claimant confirmed that his doctor was concerned that, if he went back to work, his mental health would be worse. This letter was not provided to the respondent.

70. Mr Scott wrote to the claimant on 20 May 2021, noting that the claimant had not contacted him, either verbally or in writing. Nor had a medical certificate received. The claimant had then failed to attend the investigation meeting scheduled on 14 May. The claimant was therefore invited to a formal disciplinary hearing to be held on 26 May at the Leeds Service Centre. He was advised that if he failed to attend a decision would be made in his absence. In the circumstances, he might, if he wished, make written submissions or ask a work colleague or union representative to present his case. The hearing was to be conducted by Sue Hanson, Loss Prevention Manager to consider the following allegations: being absent without authority since 7 December 2020; failure to follow the absence reporting and certification procedure; failure to respond to Mr Scott's letter of 29 April 2021; and failure to attend an investigation meeting on 14 May 2021. The claimant was warned that the respondent considered this to be a matter amounting to gross misconduct and that a potential outcome was his dismissal. He was again advised that he could be accompanied by a work colleague or union representative at the hearing and asked to inform Mr Scott if he intended to have someone accompany him or if he required any assistance in making arrangements. This was signed for by the claimant, as he accepted before the tribunal, on 21 May.

71. Mr Scott told the tribunal that he had not taken any advice on this letter. Template letters were available online and he would have flicked through some of the respondent's policies to help him word it. He had sent similar sorts of letters to people in the past. The tribunal doubts that the charges, as set out, were likely to have been formulated by Mr Scott without some advice.

72. The claimant told the tribunal that he was terrified at the prospect of such a hearing in case he was "ambushed" as he believed he had been previously.

73. Ms Hanson was tasked with determining the disciplinary issue. Ms Hanson had had no involvement with the claimant since he attended the investigation meeting with her on 13 February 2020 as referred to above. She accepted in cross-examination that the statement she had before her at that investigation made it clear that the claimant struggled with reading and writing and needed third-party support to explain and write letters.

74. Ms Hanson was unable to tell the tribunal who had asked her to chair the disciplinary hearing. When put to her that she had been asked by Ms Cousins or Ms Rycroft, she said that she did not know who had passed the matter to her. Given that the disciplinary matter was classified as potential gross misconduct, it would go to 1 of the 4 senior managers in the building. She then said that she wouldn't have been asked directly or specifically and, as the letter from the investigating manager named her as the person who was conducting the disciplinary meeting, then it was just a natural progression. The tribunal cannot conclude that Mr Scott earmarked Ms Hanson to conduct the disciplinary himself.

75. Ms Hanson believed that it was likely that she did meet with Mr Scott for him to pass to her the investigation documents. She couldn't recall exactly, however. She was provided with the claimant's final fit note and the correspondence issued by Mr Scott, but not with any sickness or personnel file in respect of the claimant. When asked if she had given any consideration to whether the claimant might be a disabled person, she said that they would need to know the cause of the absences and the reasons for the claimant's stress before considering adjustments. All she had in terms of information about the claimant's condition was the final fit note and no further information.

76. When asked if she had been aware of the previous tribunal claim, she said that she was aware now (and of the detail of it) from the documents in the current bundle. At the time it was going ahead, however, she was not aware of the tribunal. Whilst she had been involved in investigating some of the matters which were relevant in the claim, she had not been involved in it and said she did not know that the claimant had taken proceedings until this tribunal case. She had not been asked to be interviewed for a witness statement in the previous proceedings.

77. Then, in cross-examination, she said that she knew about the tribunal at the point of dealing with this disciplinary issue. She knew that the claimant had been attending the tribunal. She said that she had been told that there had been a lack of contact with the claimant to allow the tribunal to be concluded. She did not, however, know the details of the claim until she saw the documents as part of these proceedings. She was not aware that the claim had anything to do with the previous disciplinary issues. The claimant did not report to her and she had not been aware of his sickness absence or the reasons for it. Whilst she saw Ms Cousins and Ms Rycroft every morning for a 15 minute daily briefing and saw them in passing during the working day, they had not discussed the matter. She had not been aware of them being out of the business for the 7 day duration of the tribunal or any reason for their absence. Again, despite the lack of managers therefore present on site during these days, she did not have line management responsibility herself for the warehouse operations.

78. Ms Hanson said that Ms Woolley would have been aware of the ongoing tribunal proceedings. She didn't think to check what the tribunal had determined and did not think that she needed to. Having now read the earlier tribunal decision, her position remained that there was nothing which emerged from it relevant to the situation she was seeking to manage.

79. The aforementioned text from the claimant was certainly brought to Ms Hanson's attention prior to the disciplinary hearing which the respondent was seeking to arrange. Her evidence was that there was no name on the text message. They couldn't say definitively that it was from the claimant, "albeit it was a fair assumption to believe it was him in my opinion."

80. Whilst Ms Hanson accepted that the claimant referred to his "mental state" she considered the text to be very vague with him saying that he would provide information from a doctor in 2 weeks which was not in fact received. When put to her that, at the time of the disciplinary decision, 2 weeks had not yet elapsed, she said that the reference was to the information being provided within 2 weeks and that it would have been part of consideration at an appeal stage if the claimant had obtained a fit note. Furthermore, that text was sent in response to the invitation to the investigation meeting. There was then a further letter inviting the claimant to a disciplinary meeting which he had failed to engage with. There was no reason to pause unless and until they had further information. The respondent would not for instance consider sending him to occupational health unless they had confirmation from a doctor as to the reason for the claimant's absence.

81. Ms Hanson considered that the claimant had had sufficient time to engage with others who might have supported him in responding to the respondent's letters. She accepted that these letters were sent during a time when he might have had difficulty securing help from an external agency, but not from his family. The letters requested, in any event, that he made contact by telephone. She accepted,

nevertheless, that he needed support to understand such letters. She agreed also that the letters gave no alternative to him if he was unable to respond.

82. She was not aware, as put to her in cross-examination, that the claimant might be classed as a vulnerable individual. She said that she was aware that he had been anxious around the meeting in February 2020, but not of ongoing anxiety or of his history of anxiety. She agreed nevertheless that he had left a meeting in February 2020 when uncomfortable in the presence of 2 senior managers and a human resources manager. She said that she knew that stress was the reason for the absence up until December 2020, but thereafter there had been no information about his condition. She rejected the proposition that the claimant was not going to have altered healthwise, saying that she couldn't make that assumption and there was no confirmation of his state of health from a doctor.

83. Ms Hanson convened the disciplinary hearing on 26 May. She noted that Mr Scott had written to the claimant on 20 May inviting him to the disciplinary hearing and no communication had been received thereafter from the claimant. The claimant, she considered, therefore failed to let the respondent know whether he would be in attendance and, if not, his reasons for non-attendance. Further he had failed to follow the instructions set out by Mr Scott and therefore no suitable contact had been made throughout the process. She was, therefore, of the view that he remained absent without leave at the date of the disciplinary hearing. Ms Hanson had received no further information following the text, such as a fit note which the claimant had intimated in the text was being provided to Ms Cousins within 2 weeks. She said that if the claimant had provided an updated fit note or explanation as to why he could not attend, she might have taken the decision to stop the process.

84. However, having given some time on the morning of the hearing for the claimant to attend and him having not attended, she decided to proceed to make a decision to dismiss him for unauthorised absence, an offence of gross misconduct.

85. Ms Hanson noted the first day of the claimant's absence being 27 February 2020 and the expiry of the last fit note received being 6 December 2020. She went through the various letters sent to the claimant and the text message received from him. She noted the claimant's further failures to engage with investigation meeting and subsequent correspondence. She concluded that the claimant had been on unauthorised absence since 7 December 2020 and had provided no contact or explanation in relation to his absence.

86. She wrote to the claimant confirming this outcome. She said that she believed that the claimant had made no attempt to attend meetings or engage in any discussions regarding his unauthorised absence. She was satisfied there was sufficient opportunity offered to him to discuss his ongoing absence and he had failed to

provide any explanation. The claimant was given the right to appeal against the decision, which was to be made in writing to Nick Appleton, a service centre manager, within 5 working days stating his reasons for the appeal. This letter was again sent by recorded delivery and signed as received by the claimant on 28 May 2021.

87. The outcome letter referred to there being no attempt to contact the respondent to explain the reasons for his absence. Ms Hanson said that this was in her view accurate, despite the text sent, because that text related to a previous meeting and not this one. She had not received any confirmation regarding him not attending this meeting. She agreed nevertheless that she was not surprised when he did not attend.

88. When asked if she had spoken to Ms Cousins to find out if any further information had been received, as was promised by the claimant in the text, she said that she could not recall speaking to her, but was not saying that she hadn't. It was fair to assume that she had spoken to Ms Cousins and payroll as any fit note would ordinarily go there.

89. The claimant did not appeal this decision. He told the tribunal that whilst he had support from, in particular, family members, there were times when he still could not function and could not "hold information in". He couldn't manage an appeal by himself.

Applicable law

90. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the respondent.

91. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
> *depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *shall be determined in accordance with equity and the substantial merits of the case".*

92. Classically in cases of misconduct a tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard.

93. The tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

94. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

95. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to want degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event, had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

96. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – ERA Section 123(6).

97. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal. The assessment of conduct for these purposes is that of the tribunal on a balance of probabilities.

98. That applies also to the claim for damages for breach of contract. The tribunal must determine on the balance of probabilities whether the claimant committed conduct which was sufficiently serious so as to treat the contract as repudiated – was he guilty of gross misconduct?

99. Section 103A of the Employment Rights Act provides that:

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"*

100. A test of causation must be satisfied. This section only renders the employer's action unlawful where that action was done because of the protected disclosure. In establishing the reason for dismissal, this requires the tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

101. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. The tribunal is not, however, obliged to draw such inferences as it would be in any complaint of unlawful discrimination.

102. Pursuant to Section 47B of the Employment Rights Act 1996: "A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

103. Section 48(2) provides that on a complaint to an Employment Tribunal

> "… it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

104. As regards the meaning of "detriment" the tribunal refers to the case of **Chief Constable of West Yorkshire Police –v- Khan [2001] 1 WLR** where it was said that the term has been given a wide meaning by the Courts and quoting the case of **Ministry of Defence –v- Jeremiah [1980] QB 87** where is was said that *"a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".* There does not have to be any economic loss inflicted upon an employee for him or her to have suffered a detriment.

105. The issue of causation is again crucial. The tribunal refers to the case of **NHS Manchester v Fecitt and others [2001] EWCA Civ 1190** and in particular the judgment of Elias LJ. His view was that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. He said:

> *"Once an employer satisfies the Tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the **Igen** principles".*

106. Whether detriment is on the ground that the claimant made a protected disclosure therefore involves an analysis of the mental processes (conscious or unconscious) of the relevant decision makers. It is not sufficient to demonstrate that "but for" the disclosure, the employer's act or omission would not have taken place.

107. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if –*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim.*

108. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability – this involves an objective question in respect of whether "the something" arises from the disability which is not dependent on the thought processes of the alleged discriminator. Lack of knowledge that a known disability caused the "something" in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – see **City of York Council v Grosset 2018 ICR 1492 CA**.

109. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability". It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of "something". The second is that the claimant was treated

unfavourably because of that "something". In **Pnaiser v NHS England 2016 IRLR 170 EAT** it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious for process of that person, but keep in mind that the actual motive in acting as the discriminator did is irrelevant.

110. Disability needs only be an effective cause of unfavourable treatment - see **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893**. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. In that case sickness absence was as a result of stress and a heart condition. A tribunal had held that the cause of the unfavourable treatment was the police force's genuine but erroneous belief that the claimant was falsely claiming to be sick. The EAT considered nevertheless that disability had a significant influence on or was an effective cause of the unfavourable treatment. On the other hand, any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation. If an employee's disability-related absence, for instance, merely provided the circumstances in which the employer identified a genuine non-discriminatory reason for dismissal, then the requisite causative link between the unfavourable treatment and the disability would be lacking. The authorities are clear that a claimant can succeed even where there is more than one reason for the unfavourable treatment. As per Simler J in the Pnaiser case: "The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it". Further, there may be more than one link in a chain of consequences.

111. The duty to make reasonable adjustments arises under Section 20 of the Equality 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…..*

112. The tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

113. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled

and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

114. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking of the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

115. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

116. If the duty arises, it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

117. Pursuant to Section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *B does a protected act; ….*

118. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the claimant to prove facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent has contravened Section 27. The burden then passes to the

respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the discrimination claim. The question for the tribunal to ask is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test.

119. It is again clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" on the employer's decision making, discrimination would be made out. It is further clear from authorities, including that of **Igen Limited –v- Wong [2005] ICR 931**, that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather *"an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."*

120. Applying the relevant legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

121. The tribunal deals firstly with the claimant's complaint of ordinary unfair dismissal. It accepts that the principal reason for the claimant's dismissal was one related to conduct and, therefore, a potentially fair reason. Ms Hanson genuinely believed that the claimant should be classified as absent without leave in circumstances where his absence was not covered by a current fit note and he had failed to explain the reason for his absence. The respondent's sickness absence policy was clear as to the need to provide notification of absence and necessary medical certification. The claimant had been absent without medical certification from 7 December 2020 and had failed to comply with absence notification requirements, in particular, when prompted to do so by Mr Scott's letter of 16 April 2021. Mr Scott initially sought to initiate a process which may well have led to a termination of employment on the grounds of ill-health. However, the first stage was to hold a welfare meeting to understand the reason for the claimant's absence and explore the possibilities of a return to work. When the claimant failed to respond to that letter, his focus switched to requiring the claimant to respond to his communications and, when he did not, to the escalation of the matter to be dealt with as a potential gross misconduct offence on the basis of unauthorised absence. That was then, again, Ms Hanson's focus at the disciplinary hearing.

122. The question is then whether the respondent had reasonable grounds for concluding that he was guilty of misconduct after a reasonable investigation.

123. The key issue here is whether it could reasonably conclude that the claimant was acting wilfully and deliberately in declining to engage with the respondent's attempts to manage his sickness.

124. The context was of the claimant having been absent for a considerable period of time from 27 February 2020 and indeed with fit notes citing work-related stress expiring on 6 December 2020. From that date, the respondent had no ongoing explanation for the claimant's absence, but nor did the respondent take any action to chase up the claimant. The tribunal has not concluded that any form of agreement existed between the claimant and the respondent that he did not need to keep in touch and continue to provide medical certificates. However, Ms Hanson's evidence was that she believed that there had been such an understanding, so that she cannot reasonably have regarded the claimant as being at fault certainly in the period prior to the conclusion of the first tribunal proceedings.

125. Those tribunal proceedings did not conclude until 8 April 2021 and it was unreasonable for the respondent to have expected immediate contact from the claimant thereafter or the resumption of his provision of medical certificates given the lack of any request for a certificate in the preceding 5 months.

126. Mr Scott reasonably commenced the process of understanding the claimant's reasons for absence by letter of 16 April 2021 seeking to arrange a welfare meeting. However, by this stage the respondent, through certainly Ms Rycroft, Ms Cousins and Ms Woolley, was aware (from evidence in the first tribunal proceedings) that the claimant's state of mental health had worsened during his absence from February 2020 and that there was no indication at the tribunal hearing that the claimant was now a well man.

127. That information ought reasonably to have been imparted to those who were given the task of managing the claimant's sickness. Regardless of that, it is then clear that neither Mr Scott nor Ms Hanson showed any genuine interest in understanding how the claimant might be feeling. Had the process continued, as might have been anticipated, with a potential capability dismissal on the basis of long term absence, there would have been consideration of the claimant's medical condition and its prognosis. However, as soon as the claimant failed to respond to the initial invitation to a welfare meeting, the respondent effectively and quite blindly was fixed on pursuing a mechanistic process which led to dismissal on the grounds of a failure to keep the respondent informed regarding sickness absence.

128. The respondent had no regard to the clear evidence of the claimant's underlying fragility and difficulty in comprehending matters, particularly written correspondence.

129. Ms Hanson had nothing more before her than the final fit note, Mr Scott's chain of correspondence which went unanswered and the claimant's text message. She did not have his sickness file or personnel file, the occupational health report from 2019 or the keeping in touch documents from early 2020. This was in

circumstances where, from her involvement in the disciplinary issue in February 2020, she was well aware of the claimant's propensity to be anxious.

130. The respondent relied purely on written correspondence posted to the claimant by recorded delivery where there was knowledge that he would have difficulty in comprehending such correspondence and with no knowledge whatsoever as to whether he had immediate access to any support network to assist him. The respondent did not consider any form of telephone contact, leaving a message on the claimant's answerphone or emailing him. No consideration was given to the possibility of a home visit or any method of giving some comfort to the claimant to enable him to enter into a dialogue. The history of the previous couple of years meant that the respondent was reasonably aware of the need to consider such steps to enable proper engagement with the claimant.

131. The respondent's attitude towards the claimant's text message is noteworthy with a reluctant admittance of the obvious i.e. that it was from him and Ms Hanson seeking to differentiate this message as relating purely to an inability to attend an earlier investigation hearing rather than her disciplinary hearing.

132. Mr Scott's evidence was that it would have been reasonable to pause the disciplinary process on receipt of the text and that to do so was not a "big ask". The tribunal agrees. No reasonable employer would have continued the process coldly and clinically on the basis that this text did not explain properly or fully the reason for the claimant's absence and/or that it related only to an earlier investigation meeting. The respondent's actions are indicative of its haste in reaching the point of terminating the claimant's employment. His employment was terminated prior to the time lapsing in the claimant's indication that he would provide some information from his doctor. The respondent's actions are not indicative of it being open to receiving any information which might have halted the misconduct process. Ms Hanson was wholly unclear as to any steps she might have taken to determine whether anything had been received by Ms Cousins or payroll.

133. At the point of dismissal, the claimant had, as Mr Scott again agreed in his own evidence, engaged with the respondent by the text. The respondent knew that the claimant had an issue regarding his mental health and knew that the claimant was seeking time for the provision of medical information.

134. Ms Hanson and Mr Scott were problematical witnesses and wholly unconvincing as managers who were following an open process with a genuine desire to understand the claimant's situation before making the most serious determination that his employment should be terminated. Their action fell short of what a tribunal would expect a reasonable employer to do in seeking to engage with an individual who had been absent for such a long time due to long-term ill-health and where it was clear to the respondent that this related to a mental health

impairment. Circumstances existed where, following the conclusion of tribunal proceedings, a new manager was in place in Mr Scott who had not had any previous dealings with the claimant. There was an opportunity to start afresh, but Mr Scott did not even feel the need to introduce himself to the claimant. Again, there was an opportunity to take stock and seek to rebuild relationships after the employment tribunal decision, but the evidence suggests that this was not an opportunity the respondent wished to take.

135. The respondent's conclusion was not reached on reasonable grounds after reasonable investigation. The respondent certainly, on the basis of the aforementioned factors, cannot have acted within a band of reasonable responses in terminating the claimant's employment in all of the circumstances. Those circumstances include the claimant being a long serving employee, who was no longer even in receipt of statutory sick pay (the respondent has made nothing of any burden it might have perceived in terms of the continued accrual of paid holiday entitlement) and where there is no evidence whatsoever of a need to replace the claimant.

136. The claimant was unfairly dismissed. The tribunal has not, however, identified any unreasonable failure to follow the ACAS Code of Practice on Disciplinary Hearings.

137. Further, the tribunal does not consider that the reason or principal reason for his dismissal was his (accepted) protected disclosure made in a phone call to Ann Jones on 2 February 2000. This was quite a low level disclosure of information of little real consequence to the respondent as employer. The tribunal can be satisfied that Mr Scott was unaware of that disclosure occurring some time before he joined the respondent's employment and rejects the proposition that he was motivated to manipulate the absence management process to ensure the claimant's dismissal because of this disclosure. Ms Hanson, of course, had been involved in matters which flowed on from the protected disclosure, but had not been accused of treating the claimant detrimentally in the earlier tribunal proceedings. She had acted in a balanced and fair-minded manner in not allowing all the allegations raised against the claimant after he had made the disclosure from progressing to a disciplinary hearing. Again, for her, the disclosure itself was inconsequential and extremely historic by the time she terminated the claimant's employment. Whilst unreasonable in the context of a complaint of ordinary unfair dismissal, there was a genuine evidence-based conclusion that the claimant had failed to update the respondent as to the reasons for his absence and to answer correspondence. The claimant's dismissal was not automatically unfair.

138. The tribunal now turns to consider the act of dismissal as a potential act of victimisation.

139. On the issue of knowledge of the earlier tribunal proceedings, where, inter alia, complaints of unlawful discrimination were brought, the tribunal found Mr Scott not to be a credible witness. He came across as an individual who was trying to hide the truth and was consciously aware of a perceived need to put a distance between himself and, in particular, Ms Cousins and Ms Rycroft. That was a distance which indeed was very unlikely to be credible in the context of a warehouse operation with a very small management team.

140. For a newly appointed manager to have been given the task of managing the claimant's sickness to the point of a potential termination of employment must have been significant to him. It is very difficult to accept that he did not at any stage have in his mind who had asked him to carry out the process. Indeed, there are very few people who might have asked him. He suggested payroll or administration, but the claimant was not being paid at the time and those functions were of, it appears, a quite low level administrative nature. This effectively narrows the field of those likely to have instructed Mr Scott to Ms Cousins, Ms Rycroft or Ms Woolley. Indeed, it appears on the evidence that Mr Scott was handed something in circumstances where Ms Woolley did not work at the Leeds service centre and there is no evidence of any electronic communication with him delegating this task. Mr Scott told the tribunal that he does not delete his emails.

141. The tribunal considers it to be verging on the inconceivable that advice was not sought regarding progressing a process which at the outset certainly had the potential to lead to the termination of the claimant's employment very shortly after the conclusion of employment tribunal case where the claimant had succeeded in a complaint of whistleblowing detriment. This is not an unsophisticated respondent.

142. The evidence the tribunal has heard from the respondent's witnesses has been wholly unconvincing, where they seem almost to pretend that the earlier tribunal proceedings had not existed.

143. Indeed, Ms Hanson was no more convincing than Mr Scott, giving contradictory evidence regarding her awareness of the tribunal proceedings, firstly saying that she was not aware of them, then that she was at the point she terminated employment, (which of course she was because she raised a question with Ms Woolley as to whether there was an explanation for the lack of communication from December 2020) and then unaware of any detail of the tribunal claim.

144. Again, whilst not in the direct reporting line between them, Ms Hanson was part of a very small management team who used to conduct 15 minute briefings on a daily basis and came across each other at work on a daily basis. Ms Cousins and Ms Rycroft were out of the business for a number of days attending the first tribunal complaint and the idea that there was no mention of it is unlikely. The tribunal

struggles to accept that Ms Hanson knew nothing of the tribunal as it was proceeding, not least in circumstances where she had a direct interest in that she had been involved in issues relating to the claimant at the time of the events leading to the claim.

145. The tribunal must, together with these implausible denials, consider the nature of the process adopted in terminating the claimant's employment. Unreasonable behaviour is not something which on its own should lead the tribunal to potentially draw an inference of discriminatory treatment, but it is a potential factor in the right circumstances, particularly when it is unexplained. The tribunal has already described a staggering absence of thought and consideration as to the claimant's individual circumstances where there were significant warning signs that the claimant might not straightforwardly be ignoring the respondent. In the context of the recently concluded employment tribunal proceedings and in the circumstances of a very large and sophisticated employer with detailed procedures and HR support, the respondent's actions appear almost wilful. They were almost guaranteed to expose the respondent to risk in a further claim. The respondent's haste was unreasonable and without reason in the context of such a long absence where the claimant was no longer being paid and did not need to be replaced. Again, Mr Scott was clear that there could reasonably have been a pause.

146. All such factors are sufficient to shift the burden of proof to the respondent to show that the claimant having brought employment tribunal proceedings alleging unlawful discrimination was not a material influence on the decision to terminate his employment. It has singularly failed to discharge that burden. All the evidence points to treatment that would not be expected in the case of an employee with long service and the known history and vulnerabilities he possessed. The tribunal cannot be satisfied that Mr Scott and, in particular, Ms Hanson were simply following what they thought was the correct process in what they considered to be a straightforward case of gross misconduct.

147. The tribunal must conclude that the claimant's dismissal was an act of unlawful victimisation.

148. Before considering the claimant's separate complaint of disability discrimination, the tribunal turns to the allegations of detriment because of the claimant's aforementioned act of whistleblowing and his bringing of the earlier employment tribunal proceedings.

149. The claimant firstly raises him not being supported in attempting to return to work from 27 February 2020 to 16 April 2021. The claimant did not, however, attempt to return to work between those dates and the question of the potential for the respondent supporting a return to work did not arise. When the respondent sought to address the issue of the claimant's continuing absence by letter of 16

April 2021, it tried initially to set up a welfare meeting where the claimant's reason for absence could have been given and would have been discussed. No detrimental treatment arises.

150. The claimant next alleges that as an act of detriment the respondent deliberately ignored his text of 14 May 2021 when he informed the respondent that he was unable to attend the disciplinary hearing owing to his mental health. That text was considered by the respondent, but importance was not attached to it in the sense that the respondent did not consider that it provided an explanation. It cannot be simply said that it was ignored. Certainly, whilst there is confusion as to how and when the text reached Mr Scott, he did ensure that Ms Hanson was aware of it. The tribunal notes, in terms of the pleaded detriment, that the timing of the text was in relation to the invitation to the earlier investigation and not in any event the disciplinary hearing. No finding of detriment is made.

151. The claimant maintains that the respondent deliberately sent standard letters that made no provision for his difficulties knowing he had literacy issues, anxiety and depression and that he was reliant on family members to explain correspondence to him. The standard letters were sent without any thought for the claimant, but not deliberately in a manner which would hamper his engagement with them. Mr Scott, without significant knowledge of the claimant, simply completed template letters and sought to comply with the respondent's standard policy. The claimant had an opportunity to raise difficulties and seek support if he needed it.

152. The claimant next complains of a failure to offer him an opportunity to have a family member or person in support attending the meetings with him. The claimant, of course, in accordance with the standard letters, was offered the right to be accompanied by a colleague or trade union representative. The respondent did not think to offer support more widely and would simply consider any request the claimant made in response. The claimant was given the option to get in touch and request any particular arrangements which would assist him. The tribunal is unconvinced that the claimant would have felt in a position to attend any of the meetings had he been told in the correspondence that he had the option of a family member or indeed any external representative. Again, the pleaded detriment is not upheld.

153. The claimant next maintains that Ms Hanson stated in her outcome letter that the claimant had failed to provide an explanation for his absence at the disciplinary meeting when she was aware of his text of 14 May 2021. The claimant had not, however, provided the explanation he maintains he had and not in respect of the disciplinary as opposed to the earlier investigation meeting. Of course, the tribunal's conclusion is that the text ought to have initiated further considerations of pausing the process or making further enquiries, but that does not mean that the pleaded detriment is here made out.

154. The claimant maintains further detrimental treatment in him being dismissed without the respondent taking steps such as obtaining an occupational health report. The claimant was not dismissed due to his ill-health absence. He never indicated that he might be able to return to work with or without adjustments. The claimant not being referred to occupational health was not a barrier to any return to work. It was a matter that could have been discussed had the claimant been able to engage with discussions of a welfare nature when first invited to have such discussion by letter of 16 April.

155. Finally, it is said that the respondent failed to explore what support the claimant needed to return to work. However, as a matter of fact, the respondent did attempt to open a dialogue with the claimant including to find out about his state of health and showing willingness to consider support which might be given. As a first stage before any support could be explored, the respondent required information regarding the reason the claimant's absence.

156. For the reasons stated, the claimant's separate detriment complaints must fail. For the sake of completeness, the tribunal again rejects any basis for inferring that the respondent acted as it did, whether through Mr Scott or Ms Hanson, on the grounds of the protected disclosure relied upon. The tribunal has already addressed their state of knowledge and 'the reason why' in considering the complaint of automatic unfair dismissal.

157. In terms of the respondent's reasons for the aforementioned alleged treatment, the claimant was contacted by the respondent from February – April 2020 and again in April 2021 after the protected disclosure. Ms Hanson genuinely considered that the text received from the claimant was not satisfactory compliance with the respondent's absence management policies. The standard letters were sent because Mr Scott was simply seeking to follow due process. No additional right of accompaniment was given at the outset, because it was not something that the claimant had raised or the respondent turned its mind to. Even though Ms Hanson ought certainly to have been aware of the claimant's likely difficulties in attending meetings with management, she genuinely simply did not consider/recall this to be an issue. Ms Hanson's refusal to acknowledge the claimant's text as an explanation for his failure to attend a meeting was her genuine analysis of the nature of the message before her. No occupational health report was requested because the respondent did not reach the stage where it ordinarily would in considering the claimant's capability due to long-term ill-health. Again, the type of support the claimant needed to return to work was not considered for the same reason.

158. Looking at the detriments pleaded, albeit not found to be detriments, through the lens of potential victimisation, whilst the burden of proof may have shifted to

the respondent, the reasons for the individual aspects of treatment complained of by the respondent are not tainted by the claimant's raising of a protected act.

159. The tribunal now addresses the claimant's separate complaints of disability discrimination. On the facts as found, the tribunal must conclude certainly that the respondent ought reasonably to have known that the claimant was a disabled person at the point of his dismissal. The respondent now accepts stress, anxiety and depression to be the disabling impairments.

160. The occupational health report of 17 July 2019 referred to stress, with work as the trigger, rather than to anxiety and depression. It was made clear however that the health-related symptoms associated with stress tended to develop over a period of time and can be physical or psychological in nature. The claimant was clearly earmarked as someone requiring support. There was evidence of anxiousness in the claimant's interactions with his managers in February 2020 which were indicative of a heightened vulnerability.

161. By the time of the claimant's dismissal, he had been absent for a very significant period of time with fit notes covering extended periods of absence due to work-related stress. The respondent is not able to argue that it was not evident that there was no ongoing impairment simply arising out of a failure to provide fit notes in a gap between December 2020 and the conclusion of the first employment tribunal proceedings in circumstances where its primary case is that this situation was arrived at by agreement with the claimant. There was, to the respondent's knowledge, an ongoing condition with no evidence that the claimant had made some sudden improvement or, for instance, as has been suggested, had possibly determined to leave the respondent's employment already to work elsewhere.

162. It was clear from the earlier tribunal hearing that, whilst it was not concluded that the claimant was a disabled person as at February 2020, his state of health had worsened during that year. The claimant had been prescribed medication for schizophrenia in March and later in August for depression and anxiety. He had been referred to a mental health service. Whilst there was a reference to the claimant telling his doctor on 22 July 2020 that he wished to restart his life and return to work after the tribunal case, such optimism was not reflected elsewhere. Following an appeal, he was now in receipt of Personal Independence Payments. Even on its own, the claimant's text of 13 May 2021 might have put the respondent on reasonable notice to enquire further as to the claimant's state of health. Beyond doubt, against the aforementioned background and knowledge the respondent had, it was certainly on notice so as to be potentially liable for a claim of discrimination arising from disability and so as to be subject to a duty potentially to make reasonable adjustments.

163. Did then the claimant's absence from 27 February 2020 arise from his disability. This is a question for the tribunal to be determined without reference to the respondent's own subjective or objective knowledge. Again, is it really maintainable that the claimant's absence from 6 December 2020, on the basis that it was uncertified, was not a continuation of the claimant's earlier work-related stress? The tribunal does not believe so on the evidence. By the time of the first tribunal claim, there had been no recovery. The tribunal has had the benefit of hearing from the claimant and it comes across quite starkly and convincingly that he was in an extremely poor mental state before during and after April 2021, unable to turn his mind to everyday activities, unable to properly look after himself, concentrate and process information. Indeed, that is why the tribunal concludes he did not respond, other than in the text of 13 May 2021 to the respondent's communications. That is why he was unfit to attend work.

164. Whilst the claimant was not dismissed straightforwardly simply for disability related absence, he was dismissed because of his lack of engagement with the process to ascertain his ability to return to work which arose from the absence, both of which in turn undoubtedly arose from his disability. The disability related absence did therefore have a material influence on the decision to terminate his employment.

165. The respondent had a legitimate aim in seeking to manage employee attendance and in requiring information regarding their fitness and future ability to attend work. The respondent in this case, for the same reasons that the dismissal has been found to be unreasonable, cannot however be considered to have acted proportionately, again in circumstances where there was no imperative to bring matters to a head by reason of the claimant's cost to the respondent or any need to replace him.

166. The claimant's dismissal amounts to discrimination arising from disability.

167. Finally, the claimant brings complaints alleging a failure to make reasonable adjustments. The tribunal can engage with this claim, however, only based on the pleaded PCPs. Firstly, the claimant maintains that there was a requirement that he resume his contractual duties on the ending of the first tribunal complaint without consideration of any meaningful support measures. This is not a general practice. There is no evidence of how the respondent has managed other employees absent due to sickness at all. It is rightly regarded as a one-off act specific to the claimant with no evidence of likely repetition in other cases or even its continued application in respect of the claimant's own case. In any event, such PCP was not in fact applied. There was no requirement that the claimant resume his duties, but rather a requirement that the claimant engage in a process to understand his state of health. That process would have in fact involved consideration of any required support to assist the claimant in a return to work.

168. Secondly, the claimant relies on a requirement that the claimant return to work alongside the same managers in the same role. Again, this amounts not to a general requirement but a specific one-off requirement of the claimant with no evidence of likely repetition in other cases or in respect of the claimant's own individual continuing situation. In any event, such PCP was not applied in the claimant's case. The respondent did not get as far as considering how the claimant might be reintegrated into the workplace, but it appears that the claimant, had he returned, would have been working directly under a manager, Mr Scott, who was new to the business. The aspects of support the respondent would have considered, had the claimant been able to engage with the absence management process, would have included consideration of the claimant's ability to perform his role.

169. There is then still the claimant's complaint seeking damages for breach of contract. This must succeed. The claimant was not in fundamental breach of contract in circumstances where, whilst he did not comply with the respondent's absence management procedures, a potential act of gross misconduct, such non-compliance was not, on the tribunal's findings, deliberate or wilful. His non-compliance was partial given the sending of the 13 May text message. However, in any event, the claimant failed to answer correspondence because of his inability to do so due to his state of mental ill-health rather than out of awkwardness or disregard of his contractual obligations.

170. That conclusion is relevant also in terms of remedy in the complaint of unfair dismissal such that there is no basis for reducing any basic or compensatory award because of the claimant's conduct prior to dismissal.

171. The tribunal also rejects any argument that it would be just and equitable to reduce compensation on the basis of the principles derived from the **Polkey** case. Had the respondent acted reasonably, the tribunal cannot say that the claimant would inevitably or with any assessable degree of possibility have been fairly dismissed for failure to comply with the respondent's absence management reporting procedures in any event.

172. However, had the claimant been able to engage with the respondent this would certainly have led to an absence management procedure to consider whether the claimant's employment ought to have been terminated on the basis of his long-term ill-health. What would then have happened to the claimant is an open question now to be addressed in determining the appropriate remedy arising out of all of the claimant's successful complaints of unfair dismissal, victimisation and discrimination arising from disability.

Remedy

173. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the claimant, so far as possible, into the position that he would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock [1994] ICR 918** – essentially a "but for" test in causation when assessing damages flowing from discriminatory acts.

174. As regards injury to feelings arising out of the detriments as found to be proven, according to **Prison Service and others v Johnson [1997] ICR 275** the purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock** the aim is to award a sum that, in so far as money can do so, puts the claimant in the position he would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the claimants.

175. The tribunal was referred to the Vento guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the claimant.

176. The bands originally set out in **Vento** have increased and have given rise to Presidential Guidance which has re-drawn the low band for claims brought on or after April 2021 as ranging from £900 - £9,100 and the mid band from £9,100 at the lower end to £27,400 at the top end.

177. The claimant described himself as devastated by the treatment he had received saying that he would not have left the respondent if the adjustments had been made and would have continued working with it until his retirement. He considered that he had been treated in a malicious and cruel manner. He described having been left "a shell of a man" and such that his mental health declined to the point where he had lost everything which he had worked so hard for. He had been left with no confidence and left depressed and nervous. He was withdrawn and agitated, feeling the loss of his livelihood every day. He believed that it was not inevitable that he would have left the respondent and he could have returned but for a lack of support and reasonable adjustments. He described himself as

someone who did not like change and that it had not been easy to get into his job with the respondent and become comfortable in his role.

178. The claimant's position was that his doctor was advising him that his mental health could relapse with his doctors concerned that, if the claimant returned to work, he might have a relapse. The claimant agreed that if the respondent had received the "to whom it may concern" letter, referred to again below, it would have been concerned about his state of mental health.

179. It was put to the claimant that his own text of 13 May indicated his own view that he was not fit to work. The claimant said that he was "up and down" but felt he could function sufficiently enough to do what he said was a basic job. The claimant then elaborated that he might be okay for a couple of days, but then may feel tearful or nervous. There were times when he felt good and times when he felt bad.

180. The GP records indicated that the claimant was waiting for a sick note including for stress on 26 August 2021. He agreed that this did not suggest that he was able to work at that point. He had obtained sick notes for the purpose of claiming state benefits. Indeed, he confirmed that his Personal Independence Payments had continued beyond his dismissal and indeed up to the current date. He agreed that he had qualified for such payments in part because of his mental ill-health. He agreed that he had received the benefits because he was not fit to work.

181. The claimant accepted that he had received from his doctor a "to whom it may concern" letter dated 19 May 2021, which he could not recall ever being sent to the respondent. In this the doctor said that the claimant had had support from the mental health service and had just started to turn a corner. Without their services and medication the claimant believed he may have reached a point where he decided it was better off not living. The doctor continued: "The thought of returning to work after the difficulties experienced threatens to negatively impact his mental health and progress he has made. Wilbert has done everything he can to get himself into a positive place. I would support Wilbert not returning to work because of the incidences that have occurred in order to prevent a relapse in his mental health."

182. The claimant was referred to a further letter from his GP dated 4 November 2021 where it was said, as well as providing some historical information regarding the claimant's condition and medication prescribed as already described in the tribunal's factual findings, that stress and low mood continued and the claimant was seeking assistance when required.

183. The expert medical report produced following an examination of the claimant in February 2022 recorded a present assessment of a moderately severely depressed person with agitation and biological features. The claimant agreed that

this did not suggest at that time sufficient improvement in his condition to get back to work. The report referred to a number of causes of the claimant's condition over time. A worsening from 2020 was noted, which the tribunal accepts mostly related to the first tribunal process and not subsequent events at work. It was said that in 2021 it was likely that the claimant's condition was no better than it had been in the year previously. There was no indication of a worsening in the claimant's mental state in the months after the termination of his employment.

184. When asked about how the claimant might have managed if he had returned to work, given that he was nervous about some of the managers and that he was scared, he suggested that he might have been fit to work if he had been left alone, but he was anxious because of the way he had been bullied.

185. The tribunal can only compensate the claimant for loss flowing from his dismissal. It may be that the respondent's treatment of the claimant in 2019/2020 caused a significant deterioration in his ill-health. However, the tribunal cannot compensate the claimant for losses flowing from that treatment. The first tribunal might have awarded such compensation.

186. The claimant was in a poor state of mental health prior to his dismissal and for a considerable period indeed from February 2020. The only evidence of a significant worsening in that ill-health from then, indeed to now, relates to 2020 when the claimant commenced medication for anxiety/depression and separately schizophrenia. Before his dismissal he was in receipt of Personal Independence Payments, in part at least because of his mental ill-health. Immediately before dismissal, the claimant was unable to cope well with and function in his everyday life. That remained the case.

187. It is clear from the claimant's doctor's letter in May 2021, that the claimant was likely to suffer a relapse in his mental health if he returned to work. The claimant may like to think that he could have sustained a return to work, but admits himself that his health could not be maintained at a consistent level. He has continued to receive Personal Independence Payments. There is evidence of continuing stress and lack of fitness. The expert opinion of February 2022 is not indicative of any recovery in health.

188. But for his dismissal and the acts of discrimination, the claimant would, the tribunal concludes, have been put through a capability process and been dismissed fairly and without any unlawful discrimination on the grounds of long-term absence within 2 months. He would then have received his notice pay.

189. No award of compensation for loss of future earnings is therefore appropriate. The tribunal does not believe, on balance of probabilities, that the claimant will ever

be able to regain paid employment. That is, again, regardless of the acts of discrimination/victimisation.

190. In terms of injury to feelings, this was a dismissal. The process and act of it caused the claimant upset and anxiety. It did not, however, exacerbate his already poor health. Again, there is no evidence of a return to his doctor, for instance, or a change in medication.

191. The loss of the claimant's job was unwelcome, but not sudden in the sense that the claimant had been absent from work for around 15 months with no prospect of him being fit to return to work. The tribunal has regard to the **Vento** guidelines, but also looks for evidence as to the effect the act of dismissal had on the claimant.

192. The tribunal concludes that an appropriate expression of the claimant's injury to feelings in monetary terms should lead to an award of £12,000. To this must be added interest at the rate of 8% from 25 May 2021 giving an 83 week period at £18.46 per week and a total of interest therefore awarded in the sum of £1532.31.

193. As compensation for unfair dismissal, the claimant is entitled to receive a basic award. Including employer's pension contributions at the rate of 3%, a gross weekly pay figure is arrived at of £238.61 to which a multiplier of 12 must be applied given that all of the claimant's 8 years of continuous employment were served beyond the age of 41. The basic award is in the sum of ££2,863.32. Again, for reasons already explained, there is no additional compensatory award.

194. The claimant is, however, entitled to pay for the statutory minimum period of notice of 8 weeks in the gross sum of £231.66 per week giving an amount of £1853.28. To this must be added 8 weeks of pension contributions at the rate of £6.95 per week giving a further amount payable to the claimant in damages of £55.60.

Employment Judge Maidment

Date 18 January 2023